Supreme Court, U.S.
FILED
FEB 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-776

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

U S WEST, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA
and
AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,

Respondents.

OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION RESTATED

In 1983, this Court summarily affirmed the Decree that granted the United States the precise relief that it had sought in over 30 years of antitrust litigation by splitting the formerly-integrated Bell System between its monopoly and competitive businesses and imposing corresponding line of business restrictions that prohibit the newly-created firms from recreating the combinations that the Decree ended. *Maryland* v. *United States*, 460 U.S. 1001 (1983).

The question presented in this case is whether one of these successors-in-interest to the Bell System's assets can now collaterally attack the Decree on the ground that that firm's interests allegedly were not adequately represented in the earlier antitrust proceedings.

STATEMENT REQUIRED BY RULE 28.1

American Telephone and Telegraph Company ("AT&T") has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti and C., S.P.A.; Cincinnati Bell Inc.; Edelson Technology Partners, L.P.; AT&T/Ricoh, Ltd.; AT&T Taiwan Telecommunications Co.; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc.; AT&T and Philips Telecommunications, B.V.; ShareTech, Inc.; Covidea; Counterpoint Computers, Inc.; Omnicad Technology Corporation; Intermetrics, Inc.; and AT&T Microelectronica de Espana, S.A.

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STATEMENT OF THE CASE

U S West is one of the seven regional companies created by the 1982 Antitrust Decree that split the Bell System between its monopoly and competitive businesses. In this appeal, U S West seeks collaterally to attack this Decree by contending that U S West's "interests" were not adequately represented in the prior antitrust proceedings and that the District Court had no jurisdiction to bind U S West and the other successors-in-interest to the Bell System's assets. The Court of Appeals found no basis for this claim, holding that the District Court had jurisdiction over all the Bell System's assets and that AT&T had vigorously represented the interests of the Bell System's over three million owners in these antitrust proceedings. App. 9a.

There is no basis for Supreme Court review of this holding. The Court of Appeals decision would be a correct application of uniformly accepted legal principles, even if U S West's version of the facts were correct. Moreover, it is only by misstating the factual and antitrust grounds for the Decree that U S West can even

advance its contention that AT&T "negotiated the [Decrees] injunctive provisions in a manner which advanced its own [post-divestiture] corporate interests at the expense of those" of the divested regional companies. Petition, p. 17.

1. Prior to January 1, 1984, AT&T, its twenty-two Bell Operating Companies ("BOCs"), Western Electric Company, and Bell Telephone Laboratories comprised a single unitary enterprise: the Bell System. The BOCs had franchised monopolies that provided local exchange telephone services to the telephone subscribers and that originated and terminated long distance ("interexchange") calls. The BOCs owned "most" of the intercity facilities required to complete interexchange calls (App. 68a n.373) as well as the equipment that is connected to the telephone network on customers' premises ("customer premises equipment"). Western Electric manufactured equipment for use by Bell System companies in providing local and interexchange services. Bell Telephone Laboratories conducted research and development. AT&T was the parent company of the Bell System and, further, itself directly owned those network facilities used exclusively to provide interstate long distance services.

The Bell System was owned by its over three million shareholders. AT&T had fiduciary obligations to these shareholders.

The Justice Department brought separate actions to break up the Bell System in 1949 and again in 1974. In each action, the United States claimed that it was inherently anticompetitive for the Bell System both to own monopoly telephone businesses and to participate in actually and potentially competitive businesses that were dependent on these telephone monopolies. In each suit, the Department thus sought to split the Bell System between its monopoly and competitive businesses.

2. This action was brought in 1949. At that time, there was competition in only one major aspect of the Bell System's opera-

tions: equipment manufacturing. The Government's Complaint thus prayed only that AT&T be ordered to divest Western Electric and to separate telephone service and manufacturing. In 1956, the parties stipulated to the entry of a judgment ("1956 Judgment") that did not require the divestiture of any part of the Bell System. However, in exchange for preserving the integration of the Bell System, the 1956 Judgment limited the Bell System to providing regulated communications services and to manufacturing equipment of the kind used for such services.

3. Over the period 1956 to 1982, the BOCs' local telephone exchange facilities retained their characteristics as both natural monopolies and franchised monopolies. However, technological and regulatory changes introduced intense actual and potential competition into other aspects of telecommunications that required access to the local Bell exchange monopolies.

Foremost, the provision of interexchange telecommunications services and customer premises equipment became intensively competitive. At the same time, technological changes substantially eliminated the earlier distinctions between regulated telecommunications services and data processing and gave rise to a new class of "information services." Participants in all these markets required access to the BOCs' local exchange monopolies to originate and terminate calls and to transmit data and information to and from their facilities. These developments further intensified the dependence of manufacturers on the BOCs and on access to technical information about their networks.

The Bell System's exchange monopolies had thus become "bottlenecks" for a wide variety of competitive businesses. The Bell System's dual role as participant in these competitive businesses and owner of monopoly facilities on which they depended meant its BOCs increasingly had, as Judge Harold H. Greene found, "both the ability and the incentive" to thwart competition by "leveraging" their local exchange monopolies to obtain im-

proper competitive advantages in two principal ways. BOCs are "able (1) to subsidize their prices in competitive markets with supra-competitive profits earned in the monopoly market, and (2) to hinder competitors by restricting their access to the intraexchange network." *United States* v. *AT&T*, 552 F. Supp. 131, 187 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

4. The potential for such abuses led to ever-increasing controversy, turmoil, and debate. In 1974, the United States filed a second suit that sought to break up the Bell System. *United States* v. *AT&T*, No. 74-1698 (D.D.C.). There, the Government claimed that the Bell System had in fact misused its local exchange bottlenecks to impair competition in long distance, equipment manufacturing, and other markets. The Department's formal relief proposal sought to prevent any future possibility of abuses in the most direct way possible: by requiring AT&T to divest the local exchange monopolies and, in turn, prohibiting the divested companies from reentering *any* competitive businesses (so long as the local telephone franchises retained their natural monopoly characteristics). *See* Stipulation Package No. 82 (Nos. 17 & 30), *United States* v. *AT&T*, No. 74-1698 (D.D.C.).

In addition, more than 70 private treble damages antitrust actions had been brought against the Bell System on this same "leveraging" theory.[1] Furthermore, the uncertainty, debate, and turmoil were not limited to antitrust courts. The identical issues were being debated before the FCC and Congress, and both were

[1] *See, e.g., Southern Pacific Communications Co.* v. *AT&T*, 740 F.2d 980 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985); *MCI Telecommunications Corp.* v. *AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Litton Systems, Inc.* v. *AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Jack Faucett Associates, Inc.* v. *AT&T*, 744 F.2d 118 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985); *TV Signal Co. of Aberdeen* v. *AT&T*, 617 F.2d 1302 (8th Cir. 1980); *International Tel. & Tel. Corp.* v. *AT&T*, 444 F. Supp. 1148 (S.D.N.Y. 1978).

actively considering proposals to develop new forms of regulation to check the ability of the Bell entities to misuse their bottlenecks.[2]

In all these forums, AT&T had vigorously denied the allegations that it abused its local exchange monopolies to obtain competitive benefits and urged that the integrated Bell System was far more efficient than any alternative. Nevertheless, it became increasingly apparent that the Bell System's integration of competitive and natural monopoly businesses would continue to divert major and ever-increasing resources of the Bell System and the entire telecommunications industry, no matter how the then-pending antitrust, regulatory, and legislative controversies were resolved. The problem was structural; the engineering advantages of integration had become outweighed by its political, regulatory, and litigation costs.

AT&T thus concluded that its obligations as a fiduciary for the Bell System's three million shareholders required it to end the crippling uncertainty and debate. It thus agreed to the exact relief proposed by the United States in the 1974 case. On January 8, 1982, the United States and AT&T stipulated to a proposed modification to the 1956 Judgment that required the divestiture of its local exchange monopolies (which would free the Bell System's competitive interexchange and manufacturing businesses from antitrust disputes over alleged abuses of bottleneck facilities) and that prohibited the divested companies from entering

[2] *See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980), *aff'd sub nom. Computer & Communications Industry Association* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); FCC CC Docket No. 78-72 (exchange access); FCC CC Docket No. 80-742 (license contracts); FCC CC Docket No. 80-53 and No. 19129 (Phase II) (Bell System procurement practices); H.R. 12323, 94th Cong., 2d Sess. (1976); H.R. 13015, 95th Cong., 2d Sess. (1978); H.R. 3333, 96th Cong., 1st Sess. (1979); S. 611, 96th Cong., 1st Sess. (1979); S. 622, 96th Cong., 1st Sess. (1979); H.R. 6121, 96th Cong., 1st Sess. (1979); S. 2827, 96th Cong., 2d Sess. (1980); S. 898, 97th Cong., 1st Sess. (1981); H.R. 5158, 97th Cong., 1st Sess. (1981).

competitive businesses (which would assure that the divested companies and the industry would not be plagued with these same disputes). Because AT&T would not own the local bottlenecks that permitted unfair competitive advantages, the proposed Decree did not impose comparable restrictions on AT&T other than to prohibit it from reacquiring any of the BOCs. Finally, the proposed decree eliminated all the restrictions in the 1956 Judgment—which would have threatened the interests of the divested BOCs as well as those of the post-divestiture AT&T and Western Electric. *See* Petition, p. 3.[3]

5. The District Court conducted extensive public proceedings to determine whether the proposed decree was "in the public interest," under the Antitrust Procedures and Penalties Act of 1974. 15 U.S.C. §§ 16(b)-(h) ("Tunney Act").

In these proceedings, Judge Greene considered and rejected each of the arguments that U S West now advances. He held that the District Court had jurisdiction under the Sherman Act to enter binding orders against each part of the Bell System enterprise and its successors-in-interest. He further held that separate representation of the divested companies was neither feasible nor necessary because the Bell System was a single unitary enterprise and AT&T had fiduciary obligations to the *same* three million shareholders that would initially own both the post-divestiture AT&T and the divested companies. App. 66a-69a; 552 F. Supp. at

[3] Contrary to U S West's assertions (p. 3), there had been a pressing need to eliminate the technologically obsolete 1956 Judgment with respect to all post-divestiture Bell entities, including the divested BOCs. Because the 1956 Judgment limited these entities to "communications services . . . the charges for which are subject to public regulation under the Communications Act of 1934," the Judgment was susceptible to an interpretation that the BOCs could not provide exchange services (*e.g.*, cellular radio or inside wiring) when they are deregulated (as they now have been). *See* 552 F. Supp. at 138 n.17 & 178 n.198. The 1982 Decree, in contrast, allows the divested BOCs to provide all exchange telecommunications services, regardless of whether they are "subject to public regulation."

220-21; *see also id.* at 201 ("both before and after [divestiture], the same shareholders maintain the same ownership interests in the same assets").

Judge Greene then proceeded to analyze the proposed Decree and each of the proposed restrictions on the BOCs. He disapproved some proposed restrictions, but concluded that so long as the divested companies owned local monopolies, the public interest required that they be prohibited from engaging in interexchange services (552 F. Supp. at 188-89), information services (*id.* at 189-90), and the manufacture of telecommunications equipment (*id.* at 190-91).[4] The Decree, with its modified restrictions on the BOCs and on AT&T, was affirmed by this Court in February, 1983. *Maryland* v. *United States,* 460 U.S. 1001 (1983).

6. Implementation of the Decree required that the predivestiture BOCs be reconfigured as seven regional firms that owned only local exchange facilities and that had sufficient assets to provide all local exchange functions independently of AT&T. Thus, before divestiture, massive resources were transferred from AT&T, Western Electric, and Bell Laboratories to the BOCs, and the interexchange facilities and customer premises equip-

[4]Judge Greene also approved a restriction on the BOCs' participation in any businesses other than local telephone service, the provision of customer premises equipment, and directory advertising, but established a liberal procedure for waivers of this restriction. Decree, Section VIII(C), App. 83a; *see* 552 F. Supp. at 195 n.267. At the same time, he held that the BOCs would become parties to the Decree upon divestiture (*see* Decree, Section VII, App. 82a-83a), and that they may obtain relief from the core line of business restrictions if and when the local exchanges lose their natural monopoly characteristics, and he noted that the United States will make reports to the Court regarding the continuing appropriateness of the line of business restrictions every three years. 552 F. Supp. at 194-95.

On February 2, 1987, the Department of Justice filed a report with the District Court that described its view of current competitive conditions and its tentative recommendations on modifications of the line of business restrictions. Judge Greene has established a schedule for the submission of public comments on the Department's report, so this matter is now before the District Court.

ment of the predivestiture BOCs were, in turn, transferred to AT&T. The divestiture of U S West and the six other regional companies, representing 75 percent of the assets of the Bell System, occurred on January 1, 1984.

7. Since divestiture, U S West has exercised its rights under Section VII of the Decree by filing over fifteen separate motions for waivers of the Decree's line of business restrictions (*see* p. 7 n.4, *supra*), thus acknowledging that it is bound by the obligations of the Decree. U S West has also challenged the District Court's *interpretations* of the Decree's line of business restrictions. *See* Petition, pp. 11-12. However, the brief that U S West filed in the Court of Appeals in April, 1986, marked the first time that U S West (or any of the divested companies) had argued to any court that the injunctive provisions of the Decree cannot be enforced against its BOCs. After U S West's Brief was filed, other divested regional companies expressly disavowed U S West's contentions. *See, e.g.*, Tr. of Oral Argument, p. 19 (May 16, 1986).

The Court of Appeals also flatly rejected U S West's contentions, calling them "remarkable" and "specious." App. 8a-9a. It dismissed the Due Process claim on the ground that U S West and its subsidiaries "were wholly owned subsidiaries of AT&T at the time the consent decree was entered," and that it is "self-evident" that a parent company can "bind its wholly owned subsidiaries without affording them independent legal representation." App. 8a-9a. The Court of Appeals similarly rejected U S West's "equitable" claims, concluding that the only "fiduciary duty" owed by AT&T was to the three million shareholders who owned all the Bell System's assets and that AT&T would not have breached that duty even if U S West were correct that AT&T agreed to restrictions on U S West "in order to free [AT&T]." App. 9a. The Court of Appeals further recognized that U S West was wrong in asserting that the latter was the objective of the Decree. App. 11a.

REASONS FOR DENYING THE WRIT

There is no reason or basis for review of the Court of Appeals's holding that Judge Greene had jurisdiction in 1982 to enter binding orders against all the successors-in-interest to the Bell System's assets and that Judge Greene need not (and could not) have provided them with independent representation before entering the Decree. This holding does not conflict with any decision of this Court or of any court. To the contrary, it is U S West's arguments that depart from settled law.

The overriding fact is that the Bell System was a single unitary enterprise, and AT&T appeared in the antitrust proceeding on behalf of the entire system, including the exchange monopolies assigned to U S West at divestiture. AT&T then represented the interests of the over three million shareholders who owned the system and who unquestionably had the right to reconfigure its assets. Thus, the Court of Appeals simply applied the established and commonsense proposition that a corporation and its wholly-owned subsidiaries are a single enterprise, and that an antitrust court has *in personam* jurisdiction over all assets of a corporate defendant (including its wholly-owned subsidiaries), regardless of where they are located—and has plenary authority to bind the successors-in-interest to those assets.[5]

If the law were otherwise, no divestiture decree, whether litigated or entered by consent, could be enforced against the firms created by a divestiture. That would be peculiarly ironic here, because under U S West's theory, it would recreate the very com-

[5]*See, e.g., Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977); *Pennoyer* v. *Neff*, 95 U.S. 714, 723 (1878). *See also Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). Indeed, it is only because Judge Greene had this jurisdiction that he was able to direct the reconfiguration of the predivestiture BOCs as seven self-sufficient companies that owned only local exchange monopolies and to order their divestiture in that form from AT&T. *See* p. 7, *supra*. Thus, by acknowledging Judge Greene's jurisdiction to order the divestiture (Petition, p. i), U S West is acknowledging the Court's jurisdiction over the divested entities and the Court's authority to impose binding restrictions on them.

bination of monopoly and competitive businesses that the Decree sought to end. That would defeat the antitrust remedy that the Justice Department sought and secured in 35 years of antitrust litigation.

1. Under these circumstances, it is not surprising that the Court of Appeals decision does not conflict with the decision of any other court. The decisions that U S West cites are all irrelevant. U S West relies on *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964), a case that holds only that a consent judgment cannot be entered in a government antitrust suit when one party has not consented to its provisions; here, in contrast, AT&T as the parent company of the Bell System consented to the Decree on behalf of the entire System. *Hansberry* v. *Lee*, 311 U.S. 32, 42-45 (1940), and *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 691-93 (1961), are similarly irrelevant. Each discusses the power of a party to a case to bind *unaffiliated* firms. Here, the Decree applies to firms that were wholly-owned subsidiaries of AT&T when the Decree was entered and that became separate corporations that were subject to the restrictions only when they were divested to the same shareholders that owned the Bell System, pursuant to the very Decree that U S West now challenges. *See* App. 9a.[6]

Similarly, none of U S West's citations even permits an argument that AT&T could have breached a fiduciary duty to U S West by consenting to the antitrust relief that the Department of Justice had sought for over three decades. To the contrary, *Pepper* v. *Litton*, 308 U.S. 295, 306 (1939) (cited by U S West, Peti-

[6]U S West miscites *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969). That case does not hold that there is no "privity" between a parent corporation and its wholly-owned subsidiary. Rather, it holds that the determination whether a parent corporation is bound by its subsidiary's conduct must be made in a proceeding in which the court has jurisdiction over the parent corporation. Here, in contrast, the parent corporation *was* a party; the court had jurisdiction over all its assets (including its interests in wholly-owned subsidiaries), and the parent company agreed to bind the entire Bell System.

tion, p. 19), refutes U S West's claim.[7] It teaches that corporate fiduciaries owe duties to those with economic interests in the corporation: that is, its shareholders, bondholders, and creditors. As the Court of Appeals held, AT&T's fiduciary obligations were to the Bell System's over three million owners, *not* to AT&T's wholly-owned subsidiaries or to specific Bell System assets.

2. In this regard, the character of AT&T's fiduciary obligation to its shareholders refutes U S West's assertions (Petition, p. 17) that the Decree could have been "negotiated" to advance the "corporate interests" of the post-divestiture AT&T "at the expense of those of the BOCs." Preliminarily, the Decree was not "negotiated" in the usual sense; AT&T consented to the Department's *precise* proposed remedy because it was the only way to

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[7]U S West's remaining citations are mystifying. *FTC* v. *Exxon Corp.*, 636 F.2d 1336 (D.C. Cir. 1980), is another decision by the Court of Appeals that held against U S West's claim. That case does not hold that a wholly-owned subsidiary is entitled to separate representation in an antitrust case. There, Exxon was permitted to acquire a company, subject to a court order to "hold" it "separate" during the FTC proceedings that would determine whether the acquisition violated the antitrust laws. The Court allowed Exxon to represent both its and its wholly-owned subsidiary's interests during the FTC proceeding and recognized that the Exxon subsidiary indisputably *would* be bound by the final order. *Id.* at 1342. The only purpose of the "hold separate" order was to protect the subsidiary's trade secrets and other confidential information from disclosure to Exxon until it was decided whether the integration of the Drives Group and Exxon would be lawful. Here, in contrast, there was no basis for even a hold separate order because the to-be-divested portions of the BOCs had been parts of the integrated Bell System for 100 years. *See* 552 F. Supp. at 220-21.

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), is also irrelevant. There, this Court held only that divestiture was required when the Court had earlier held that this remedy was mandated by Section 7 of the Clayton Act. It was undisputed that the divested entities would be bound by the decree. Indeed, there the Justice Department had "reluctantly acceded" to a lesser remedy. *Id.* at 137-38. Here, in contrast, the Department obtained the precise relief that it had sought in decades of litigation.

end the incessant antitrust and competitive controversies that were crippling the Bell System and threatening its shareholders. More fundamentally, because the divested companies represented $115 billion of the Bell System's $150 billion in assets, AT&T's fiduciary obligation to the Bell System shareholders required AT&T to assure that local monopolies were divested in financially sound condition and with adequate resources to pursue their businesses—as each was.

Indeed, the sole basis for U S West's argument that the divested companies' interests were sacrificed is that the post-divestiture AT&T was freed from most Decree restrictions, whereas the divested companies were not. This argument ignores the antitrust basis for the Decree. With the divestiture of the local monopolies, there was no basis for restricting the competitive portions of the Bell System that were assigned to AT&T. But it does not follow that the post-divestiture AT&T (which has no monopoly revenues and which has experienced disappointing financial returns) is better off than the post-divestiture BOCs (which have monopoly revenues and which have been financially successful beyond all expectations). It simply reflects that different antitrust obligations attached to the former Bell System's bottleneck monopolies than to its competitive assets.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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